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FEDERAL COMMUNICATIONS COMMISSION
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VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

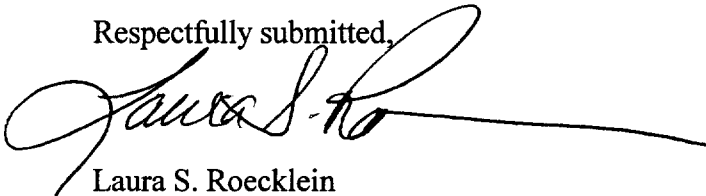
Re: Comments of Nextel Communications, Inc.
CC Docket No. 96-61, CMRS Interexchange Rates

Dear Ms. Salas:

Submitted herewith are an original and four paper copies of the Comments of Nextel Communications, Inc. ("Nextel"). Also enclosed is a 3.5 diskette "read-only" copy of same.

Please inform me if any questions should arise in connection with this submission.

Respectfully submitted,


Laura S. Roecklein

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MAY 27 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Policy and Rules Concerning the)
Interstate Interexchange Marketplace)
)
Implementation of Section 254(g))
of the Communications Act of 1934,)
as Amended)
)
To: The Commission)

CC Docket No. 96-61

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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May 27, 1999

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SUMMARY

Since 1993, both Congress and the Commission have fostered an extremely successful policy for commercial mobile radio service (“CMRS”) of favoring market-based competition over rate regulation. Nothing in the 1996 Act was meant as a direction to the Commission to reverse course. As Nextel explained in its recent Petition for Reconsideration of the Commission’s *Order* in this proceeding, there are substantial legal reasons why the Commission is not required to treat any CMRS service as subject to Section 254(g). It is ironic that an industry that never should have been swept within the ambit of Section 254(g) now must seek forbearance or face landline rate integration rules that must be tortured to the breaking point to be rationally applied to an increasingly diverse CMRS market. To Nextel, this suggests not only a strong case for forbearance, but also counsels for reconsideration of Section 254(g)’s application to CMRS at all.

In examining whether forbearance is justified in the context of CMRS rate integration, the Commission must determine whether an integration requirement would directly ensure that a carrier’s rates are just and reasonable, or whether the regulation would merely promote CMRS competition indirectly. Based on the current state of dynamic competition in the CMRS marketplace, and the variety and number of CMRS service options, a rate integration requirement for CMRS wide-area service plans is unnecessary to ensure that CMRS providers do not charge their off-shore, rural and high cost customers rates higher than those charged to their urban subscribers. Indeed, the plethora of rate and service plans offered to consumers by competing carriers — including new plans offering buckets of wireless access, airtime and long distance service — confirms that existing market conditions impose sufficient restraint on CMRS

carriers to make an interexchange rate integration requirement for CMRS completely unwarranted.

There is also significant evidence to show that CMRS rate integration is unnecessary to prevent affirmative harm to consumers or to promote competition in the market in which CMRS providers compete. In the past several years, the Commission has encouraged an extremely successful policy in favor of new CMRS market entry, rate deregulation, competition and service innovation. This environment has caused a continued downward trend in CMRS subscriber rates and a continued increase in customers and in customer satisfaction. Nextel and other CMRS providers have responded to increased consumer demand for flexible pricing and higher service quality by creating new pricing options and varying service plans designed specifically to suit customer demands. These real-world pro-competitive trends would be compromised by rate integration that would essentially constitute rate regulation of CMRS carriers. On the contrary, these trends demonstrate that the marketplace is properly responding to subscriber needs.

An interexchange rate integration obligation for CMRS is nothing more than *regulation in search of a problem that does not exist*. Caution should be exercised when there is no record indicating a problem requiring regulation — not to mention the obvious dislocations, compliance costs and confusion stemming from imposition of unnecessary regulation. Not only would many wide-area calling plans, for instance, have to be substantially redesigned and perhaps removed from the market, new systems heretofore irrelevant to the CMRS world would have to be created to identify which calls or portions of calls would be subject to a rate integration requirement.

This would be a costly and overly burdensome activity for the Commission, carriers and customers and it certainly would require a substantial phase-in period. Thus, the Commission should not go beyond requiring rate integration for the separately stated long distance charges.

Finally, there should be no question that it would be a counter-productive step backwards to apply interexchange rate integration to flat-rate, distance insensitive CMRS calling plans. The proliferation of flat-rate and wide-area calling plans sharply increase customer choices and an interexchange rate integration requirement will not promote CMRS competition or ensure nondiscriminatory rates. The Commission should thus forbear from applying Section 254(g) to these and other competitive CMRS rate plans.

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To: The Commission)	

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits its Comments on the Further Notice of Proposed Rulemaking in the above-referenced proceeding concerning whether and how to integrate CMRS "interexchange" rates.^{1/}

Nextel is a broadband CMRS provider of advanced digital communications services available in over 400 cities nationwide. Through subsidiaries, Nextel offers integrated packages of digital wireless services of particular value to businesses, including digital cellular service, Direct ConnectSM (a two-way dispatch service that provides instant conferencing capabilities), paging and alphanumeric short-messaging services. Nextel also provides traditional analog Specialized Mobile Radio ("SMR") service for approximately 300,000 users.

^{1/} See Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-61, FCC 99-43 (rel. April 21, 1999) ("*Notice*").

Section 254(g) directs the Commission to impose rate integration requirements on providers of “interstate, interexchange telecommunications services.” As explained in these comments, CMRS providers offer a range of services to their subscribers that may or may not include a service that might be deemed an “interstate, interexchange service.” Thus, the Commission’s proposal in this *Notice* to break out an interstate, interexchange component from CMRS services plans poses substantial practical implementation problems. CMRS carriers do not maintain any common or uniform method for identifying segments of their traffic as “interexchange” for any regulatory purpose.^{2/} In fact, a majority of CMRS carriers now offer as one of many service options “one rate” service plans that do not distinguish long distance from local calls. As demonstrated below, in keeping with the circumstances of the CMRS marketplace and the best interests of consumers, the Commission should forbear from applying Section 254(g) to any portion of CMRS wide-area service plans.

I. INTRODUCTION

The Commission has determined that it must apply Section 254(g) to the interstate, interexchange services of CMRS providers. In its December 31, 1998 *Order*,^{3/} the Commission concluded that the language of Section 254(g) is unambiguous and, failing a decision to forbear, *requires* application of the rate integration and averaging requirements to CMRS.

^{2/} As explained herein, on its more traditional service plans, Nextel does assess users a “long distance” charge. This charge, however, cannot be equated to an interstate, interexchange charge as that term is used in Section 254(g).

^{3/} See Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Memorandum Opinion and Order*, CC Docket No. 96-61, FCC 98-347 (rel. Dec. 31, 1998) (“*Order*”).

The CMRS market bears testament to the Commission's highly successful deregulatory policy of favoring market-based competition over regulation. Application of a rate integration and averaging rule to CMRS is not mandated by law and presents substantial practical problems to many CMRS licensees that simply are not posed in the context of landline markets. For example, to enforce a rate integration and averaging requirement upon CMRS services, the Commission must first develop some rational and cogent definition of CMRS "interstate interexchange" service. Any such definition would have to be framed so as not to disrupt the wide variety of existing CMRS operations and customers' expectations. If the Commission cannot reach the determination that certain CMRS services fall outside the scope of Section 254(g), then the Commission has the authority to and should forbear from applying Section 254(g)'s rate integration requirements to CMRS wide-area rate plans.

II. CONDITIONS IN THE CMRS MARKET MEET THE FORBEARANCE REQUIREMENTS OF SECTION 10.

Nextel filed a Petition for Reconsideration of the Commission's *Order* in this proceeding.^{4/} Nextel presented compelling legal reasons why CMRS services should not be subject to Section 254(g). Without repeating these arguments, Nextel observes that it is ironic that an industry that never should have been swept within the ambit of Section 254(g) now must seek forbearance or face landline rate integration rules that must be tortured to the breaking point to be rationally applied to an increasingly diverse CMRS market. To Nextel, this suggests not

^{4/} See Nextel Communications, Inc. Petition for Reconsideration in CC Docket No. 96-61, FCC 98-347 at 3 (filed March 4, 1999) ("Nextel Petition"); Reply Comments of Nextel Communications, Inc. in CC Docket No. 96-61, FCC 98-347 (filed April 26, 1999) ("Nextel Reply").

only a strong case for forbearance, but also counsels for reconsideration of Section 254(g)'s application to CMRS at all.^{5/}

To satisfy Section 10's three-pronged forbearance test, the proponent of forbearance must demonstrate that application of the regulation is: (1) unnecessary to prevent unjust or unreasonable charges or practices; (2) that enforcement of existing regulation is unnecessary to protect consumers; and (3) that forbearance is consistent with the public interest, *i.e.*, will promote competition and expand service options in the marketplace.^{6/}

In examining whether forbearance is justified in this case, the Commission must consider whether a CMRS "interexchange" rate integration requirement would play a direct role in ensuring that rates are just and reasonable, or whether the regulation would merely promote competition in the CMRS marketplace — an already highly competitive industry — and thus have only an indirect effect, if any, on the rates and practices of CMRS carriers.^{7/} Under this first prong of the forbearance test, the Commission must analyze whether existing market conditions impose sufficient discipline on CMRS carriers to make application of a rate

^{5/} As the Commission has recognized in other contexts, a decision not to apply a particular rule or statutory provision does not in any way undercut the Commission's ability to examine a CMRS carrier's charges or practices under its Section 201 and Section 202 authority, which is sufficient to protect against unreasonable rates or unreasonable discrimination in the absence of any demonstrated problem. *See, e.g.*, Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations and Telephone Number Portability, *Memorandum Opinion and Order*, WT Docket No. 98-229, CC Docket No. 95-116, ¶ 20 (rel. February 9, 1999) ("*CTIA Forbearance Order*").

^{6/} *See* 47 U.S.C. § 160(a)(1)-(3). *See also CTIA Forbearance Order*.

^{7/} *CTIA Forbearance Order* at ¶ 19. If a regulation has only an indirect impact, then forbearance under this prong of the analysis is justified.

integration requirement unnecessary.^{8/} If, for instance, competition in the CMRS marketplace is expanding without a rate integration requirement then the regulation may not be necessary.^{9/}

Under the second prong of the forbearance test, the Commission assesses whether there is substantial evidence that rate integration is necessary to prevent affirmative harm to consumers.^{10/}

If, for example, the record indicates that the demand for a CMRS “interexchange” rate integration requirement is currently low and that consumers generally are more concerned about competition in other areas such as flexible pricing options, wider coverage areas and service quality, then forbearance may be appropriate.^{11/}

Finally, under the third prong of Section 10, the Commission examines whether the application of an interexchange rate integration requirement is important to promote the rapid development of vigorous competition in the CMRS market.^{12/} As demonstrated below, the number and diversity of rate plans offered in the current CMRS marketplace, as well as the

^{8/} Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance For Broadband Personal Communications Services; Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, 16876 (1998) (“*PCIA Forbearance Order*”) (“We are not convinced on the present record, however, that existing market conditions impose such discipline on broadband PCS providers, or on other providers subject to the CMRS resale rule.”).

^{9/} *CTIA Forbearance Order* at ¶ 19 (noting, in the context of local number portability, that “not only is CMRS competition currently growing rapidly without LNP, but in the near term, LNP does not appear to be critical to ensuring that this growth continues.”).

^{10/} *Id.* at ¶ 22.

^{11/} *Id.*

^{12/} *PCIA Forbearance Order*, 13 FCC Rcd at 16878.

dramatic increase in CMRS competition in the past few years — coupled with the lack of consumer complaints about CMRS interexchange rates — make plain that the standards for regulatory forbearance are met.

A. Application of Section 254(g) Is Unnecessary to Protect Consumers From Unjust or Unreasonable CMRS “Interexchange” Rates.

As the Commission has recognized, the underlying purpose of Section 254(g) is to ensure that providers of interexchange telecommunications services do not charge subscribers in rural and high cost areas interexchange rates higher than the rates charged subscribers in urban areas.^{13/} Section 254(g) also was enacted to guarantee that residents of off-shore areas are not faced with higher interexchange rates than residents of the contiguous United States. Based on the current state of robust competition in the CMRS marketplace, and the variety and scope of CMRS service options that price the long distance portion of CMRS service at the same rate as local service, a rate integration requirement for the “interexchange” component of CMRS wide-area service plans simply is unnecessary. As explained below, the proliferation of rate and service plans among competing providers demonstrates that existing market conditions impose enough restraint on CMRS carriers to make an interexchange rate integration requirement superfluous.

The *Notice* seeks comment on the scope of CMRS rate plans available in today’s market.^{14/} Obviously there are a wide variety of plans and new types of plans are constantly under development by CMRS carriers that seek to maintain and expand their market shares in an

^{13/} See Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Report and Order*, 11 FCC Rcd 9564, 9568-69 (1996).

^{14/} *Notice* at ¶ 15.

increasingly competitive market. The wide variety of plans also indicates a market in which carriers seek to differentiate their service to appeal to specific market segments.^{15/}

Nextel offers its customers several types of service plans, including national plans for large corporate accounts that want to activate customers in numerous markets, as well as a variety of “local market” plans tailored to the competitive conditions in particular markets. Most plans include a specified level of digital cellular minutes as well as a specified level of Direct ConnectSM minutes.^{16/} These plans are generally categorized as Nextel’s “Integrated Rate Plans.” For example, the current Integrated Rate Plan charges for Honolulu is \$60.00 per month, which includes 225 minutes of airtime and \$0.21 for each additional non-long distance minute. Nextel offers residents in Los Angeles a comparable rate of \$79.99 per month with 250 minutes of airtime included and \$0.28 for each additional minute, and subscribers in New York pay \$69.95 per month with 300 minutes of airtime included and \$0.30 for each additional minute. Integrated Rate Plan customers typically can choose among three graduated levels of airtime minutes included within the monthly charge for service. None of Nextel’s service plans have roaming fees associated with their use.

^{15/} Some carriers, for example, set rates and develop service to appeal to mass markets, while others strive to offer pricing plans and features desired by the business community. This conduct, of course, is what competition is all about.

^{16/} Nextel’s Integrated Rate Plans include Nextel’s Direct ConnectSM service allows Nextel subscribers to communicate with co-workers, clients, and associates by simply pushing a button on their wireless phone to establish a one-to-one or one-to-many communication. Direct ConnectSM is not an interconnected service, and there is no separate “long distance” charge ever assessed subscribers for use of Direct Connect.SM Nextel also offers a “cellular only” plan that excludes Direct ConnectSM minutes from the plan. Domestic U.S. “long distance” minutes (as well as international long distance minutes) are broken out under both the Integrated Rate Plans and the cellular-only rate plans and are charged separately.

Nextel has recently introduced its National Business Plan that allows subscribers to select among several levels of use for a flat monthly rate with no separate charges for domestic long distance calls.^{17/} National Business Plan subscribers can call *anywhere* in the United States, including Alaska, Hawaii and other offshore domestic locations, without incurring a separate long distance charge. Any “overage” of minutes beyond those included in the subscriber’s selected bucket of minutes are billed at the specified rate of \$0.25 per minute regardless of whether the use is for a local or domestic long distance call. Nextel’s National Business Plan is available to Nextel’s customers in Hawaii under the same terms and conditions as everywhere else Nextel provides its digital services.^{18/}

Each of Nextel’s Integrated Rate Plans provides local calling areas that are significantly larger than the traditional landline local calling area without the assessment of a toll or long distance charge.^{19/} Nextel’s Integrated Rate Plans identify and separately state the charges for long distance calls. Similar to other CMRS carriers, Nextel determines which calls will be treated as local or long distance not based upon whether the calls are handled entirely on Nextel’s network or on other similar factors, but based rather on Nextel’s judgment about the competitive

^{17/} Nextel is not alone in the provision of ubiquitous nationwide service offerings that do not differentiate “local” from “long distance” use. Indeed, both Sprint (with its Free and ClearSM plan) and AT&T (with its Personal Network offering) have begun to offer new wide-area calling plans that provide subscribers with greater pricing and service flexibility.

^{18/} Nextel subsidiaries do not provide digital CMRS services outside the continental U.S., except for Hawaii.

^{19/} Nextel uses the term “long distance” to describe CMRS calls that are not classified or charged as wide area local calls. Nextel does not have any mechanism that identifies either local or long distance calls as “interstate, interexchange” calls.

conditions of the particular market. In Florida, for example, where potential customers of all CMRS service providers want large local calling areas, Nextel maintains a state-wide “local” calling area, assessing no long distance charges on calls placed anywhere throughout the state.^{20/} Plainly, consumer appetite for larger and larger “local” calling areas for CMRS is significant and accelerating with the growth of “all you can eat” nationwide bucket of minutes plans.

Nextel’s service plans also have several features that benefit subscribers by lowering applicable airtime charges. The first is “one second rounding.” To provide customers with the most cost-efficient use of their wireless phones, Nextel does not round airtime charges (either for local or long distance airtime) to the next minute. Instead, after the first minute of cellular use, Nextel rounds to the nearest second so cellular customers do not pay for airtime they do not use.^{21/} Second, Nextel is a nationwide provider, constructing its ubiquitous digital network throughout most of the United States. As part of its service differentiation strategy, Nextel never imposes roaming charges on its users nationwide, including when a Hawaiian subscriber uses her Nextel phone when traveling in San Francisco or New York. In other words, the subscriber’s choice of plan and service profile moves with them as they travel.^{22/} This subscriber, however,

^{20/} Similarly, in the Baltimore-Washington market, Nextel’s local calling area, like those of other CMRS providers, includes Washington, D.C., and large portions of Maryland and Virginia.

^{21/} For Direct ConnectSM service, Nextel rounds to the nearest second beginning with the first second of the call.

^{22/} Further, Nextel does not impose any additional roaming charges on its subscribers for use of their phones in Canada.

assumes the local calling characteristics of their particular location. Thus, the calls of a Hawaiian subscriber traveling in New York are treated as New York local or long distance calls.

Like other CMRS carriers, Nextel is constantly evaluating new service programs. Nextel, as well as other CMRS providers, offers consumers throughout the United States many choices of CMRS service that are tailored to different usage profiles. What is strikingly obvious in any thoughtful review of the scope and scale of CMRS carrier offerings in the marketplace today is that CMRS customers have many options from a variety of providers, both large and small. They can get distance insensitive pricing for CMRS services or they can choose to have a more traditional rate plan that separately states an applicable per minute long distance charge. The Commission will labor in vain to establish any sort of common denominator as to what each CMRS carrier treats as "long distance" or "interexchange." This circumstance is not due to any attempt to discriminate against offshore or rural customers and residents. It is the result of a CMRS market that developed competitively rather than under a uniform set of regulations, or the confines of landline concepts of exchange and interexchange predicated upon a monopolistic market structure.^{23/}

^{23/} Indeed, some CMRS carriers such as the Bell Operating Company affiliates, prior to the 1996 Act, had interLATA equal access obligations and treated traffic going out of its LATA as "interexchange." Other carriers without this access obligation developed more fluid concepts of what was treated within their networks as long distance assessed upon subscribers according to their views of the best means of serving their customers. Generally, however, CMRS carriers provide new customers with coverage maps that show the areas within which a CMRS call is deemed "local" and subscribers have access to this information when they are evaluating competing CMRS providers and their service plans.

Imposing an “interexchange” rate integration requirement would present immediate difficulties. To the extent the Commission seeks to go beyond examining a separately stated long distance charge and requires interexchange rate integration for other types of service plans, its efforts will have harmful consequences. First, systems would have to be developed to identify and classify which calls or portions of calls would be subject to the requirement. This would not be a costless activity for the Commission or for carriers and customers; it is certainly not something that could occur without a substantial phase-in period. Second, wide-area calling plans would have to be completely redesigned to conform to government mandates. Finally, rate integration could end up skewing the competitive market by eliminating competition among smaller and larger CMRS carriers, which would no longer be able to adjust their rates based on competition in the particular markets they serve.

The Commission should be cautious about taking actions that might halt the continued progress and innovation that has been occurring rapidly in the CMRS marketplace, particularly where there is no record of harm to consumers. It is not obvious what would be accomplished by rate regulation — other than hindering carriers’ ability to compete with innovative service plans and offerings. The Commission should thus forbear from the application of Section 254(g) to CMRS wide-area calling plans. Rate integration regulation is unnecessary to ensure that the interexchange portion of the rates for wide-area plans are comparable in off-shore, rural, high cost and urban areas throughout the United States. The CMRS service plans in the market today demonstrate that there is no interexchange rate discrimination problem to be remedied by regulation. The Commission should not seek to regulate rates where there is not one scintilla of evidence of a market failure.

B. Application of Section 254(g) to CMRS Wide-area Calling Plans Is Not Necessary to Protect Consumers, and Is Inconsistent with the Public Interest.

Substantial evidence exists that shows CMRS interexchange rate integration is unnecessary to prevent affirmative harm to consumers or to promote competition in the CMRS market.^{24/} Over the past few years, the Commission has established and cultivated an extremely successful policy in favor of CMRS rate deregulation, competition and service innovation.^{25/} This environment has resulted in a continued downward trend in CMRS subscriber rates and a continued increase in customers and in customer satisfaction. Indeed, Nextel and other CMRS providers have responded to increasing facilities-based competition, as well as consumer demand for flexible pricing and higher service quality, by introducing innovative pricing options and varying service plans tailored to the needs of residential and business customers.^{26/} These real-

^{24/} In contrast, the comments previously filed by representatives of the states of Alaska and Hawaii in this proceeding presented no evidence of consumer complaints or dissatisfaction with any aspect of CMRS service options and pricing plans available in those states.

^{25/} See, e.g., Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993); Amendment of Part 90 of The Commission's Rules To Provide For the Use of The 220-222 MHz Band By The Private Land Mobile Radio Service, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 10968 (1997) (limiting restrictions and regulations on 220 MHz nationwide licenses and providing licensees flexibility associated with larger spectrum blocks to help promote technical innovation and competition in the CMRS marketplace); Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees and Implementation of Section 257 of the Communications Act: Elimination of Market Entry Barriers, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21831, 21833 (1996) (adopting limited rules for CMRS that "generally permit open entry, allow flexibility, encourage technical efficiency, promote innovation and facilitate seamless networks.").

^{26/} See <<http://www.nextel.com>> (providing a range of rate plans designed to suit customer needs); <<http://csg.sprint.com/pcs/>> (explaining Sprint's new PCS Free & Clear PlanSM); <www.catalog.att.com/cmd/pnet/> (describing AT&T's Personal Network, which

world pro-competitive trends do not call for what is essentially rate regulation of CMRS carriers. On the contrary, these trends demonstrate that the marketplace is properly responding to the needs of customers and protecting them from unjust and unreasonable CMRS “interexchange” rates.

This increase in competition in offering new service and pricing options has not gone unnoticed. The Commission has recognized that competition in the mobile telecommunications environment has increased significantly as a result of service launches by broadband PCS and digital SMR carriers, and that broadband PCS and digital SMR carriers have achieved a significant presence in most major markets across the country.^{27/} Moreover, several pricing trend reports — including one by the Commission itself — indicate that broadband CMRS prices have been falling and that these reductions are at least partly the result of entry by new competitors.^{28/} Because there is no evidence to establish that a demand for a CMRS “interexchange” rate integration requirement currently exists, and because it is plain that

allows subscribers to create their own service plan). Many other CMRS carriers maintain similar web sites offering information on available coverage and service plans.

^{27/} See *CTIA Forbearance Order* at ¶ 19; see also <<http://www.nextel.com>> which provides nationwide maps by service area approximating the scope of Nextel’s digital network coverage.

^{28/} Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Third Report*, 13 FCC Rcd 19746, 19751-53 (1998) (noting that “[p]erhaps the most dramatic change in the mobile telephone sector since the Second Report is the entrance of new wireless competitors in numerous markets across the country. . . . [While] [i]t is difficult to measure the overall change in mobile telephone prices brought about by this entry . . . there are a number of reports on pricing trends available. Taken together, these reports suggest that prices have been falling and that the reductions are at least partly the result of entry by new competitors.”); see also *CTIA Forbearance Order* at ¶ 19.

consumers generally are more concerned about flexible price offerings, wider coverage areas and improved service quality, the Commission should forbear from applying Section 254(g) to CMRS wide-area service plans.

C. Imposition of a Rate Integration Obligation on CMRS Providers Is Regulation in Search of a Non-Existent Problem.

As previously stated, the need for affirmative regulation of a single component of a CMRS rate has not been established. No evidence has been offered to show consumer dissatisfaction or complaints regarding CMRS “interexchange” rates and services being offered in offshore, rural or high cost areas. Instead, there is much evidence demonstrating consumers want and are buying CMRS service plans that include flat rate local and long distance services.^{29/} These “one-rate” plans, in which long distance charges are virtually eliminated, entirely erase the distinctions between local and toll calling and provide significant benefits for consumers with new and expanded service choices.^{30/} There should be no question that it would be a counter-productive step backwards to apply interexchange rate integration to flat-rate service plans. The relative uniformity of rates that exist with one-rate and wide-area calling plans and the plethora of customer choices demonstrate that an interexchange rate integration requirement will not

^{29/} Indeed, one large service provider, AT&T, recently has reported a consistent increase in its Digital One Rate subscribers at a rate of 100,000 per month. *See Simplicity and Flexibility in Pricing Are Good Things; Carrier Quarterlies Are Offering Up Proof*, PCS WEEK, May 5, 1999.

^{30/} This phenomena is not unlike that of the Internet, where distance of the communication is entirely irrelevant to pricing of Internet access services.

promote CMRS competition. The Commission should thus forbear from applying Section 254(g) to these and other competitive CMRS rate plans.^{31/}

An interexchange rate integration requirement that requires a CMRS carrier to identify and “pull out” a rate component for regulatory scrutiny will create new costs for carriers (and ultimately customers) and impede CMRS innovation. It should trouble the Commission that forcing rate integration may only achieve changes in calling plans that take away service options for consumers, rather than the introduction of new service plans responding to the competitive dynamics of the CMRS marketplace.

Moreover, the Commission has already acknowledged the difficulties faced by CMRS providers in trying to separate out an “interexchange” or “interstate” portion of a service that is sold on a unified, non-jurisdictional basis. In the Universal Service context, for instance, the issue of how to identify and separate interstate and intrastate traffic and resulting revenues for calculating Universal Service support contributions for CMRS providers remains unresolved almost two years into the universal service reporting process.^{32/} As the Commission observed in its October 1998 Further Notice, “wireless telecommunications providers operate without regard

^{31/} See Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1418 (1994) (noting that Congress has given the Commission authority to forbear from applying Title II provisions to CMRS providers if such regulation is not needed to prevent unreasonably discriminatory rates, or to protect consumers).

^{32/} Federal-State Joint Board on Universal Service, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 21252, 21257-58 (1998) (adopting an interim “safe harbor” estimate of interstate traffic to be used pending selection of a permanent methodology in the proceeding).

to state boundaries.”^{33/} Attempting in that same instance to provide some guidance, the Commission sought comment on whether it should require the use of Major Trading Areas or other boundaries as the basis on which CMRS providers might estimate and report their level of interstate wireless traffic for universal service purposes.^{34/} The problem is just as intractable in this proceeding.

While it understands the concerns expressed by the representatives of the states of Alaska and Hawaii that their consumers be protected from interexchange rate discrimination, Nextel is nonetheless concerned that the Commission, in the face of pro-competitive evidence to the contrary, is unnecessarily heading in the direction of increased regulation over CMRS. Indeed, it appears that the Commission’s current policy of applying Section 254(g) to separately stated long distance charges is more than sufficient to accomplish its goal of nondiscriminatory CMRS long distance rates throughout the United States. Carving out an “interexchange” component of a CMRS wide-area or one-rate plan that does not separately state a charge for the bucket of long distance minutes included, on the other hand, will only serve to drive up “local” rates. Such

^{33/} *Id.* at 21270.

^{34/} *Id.* As in the rate integration proceeding, Nextel opposed the adoption of a uniform boundary for assessing the jurisdictional nature of traffic or revenues. There, as here, a uniform boundary does not reflect carriers’ actual service areas and would inevitably help some carriers and hurt others.

regulation should never be imposed where there is *no* evidence that an unlawful discrimination problem actually exists.^{35/} Such a result also harms the Commission's often-expressed hope that CMRS can eventually compete with the incumbent local exchange carrier for local customers.

For all these reasons, regulation here will hinder, rather than advance, the Commission's policy in favor of increasing competition in local markets. The Commission must not turn an increasingly competitive CMRS marketplace into a less competitive one through application of landline rate integration. Instead, Nextel suggests that the Commission continue to monitor market developments in its annual CMRS Report and take action if any demonstrable harmful CMRS interexchange rate discrimination develops.^{36/}

The Commission took this more measured approach to regulation in its recent *Truth-in-Billing Order*. There, the Commission concluded that there was no need to apply top-to-bottom

^{35/} While the Commission apparently believes it is compelled to regulate in this manner by the language of Section 254(g), the *Notice* properly recognizes that this situation is not without hope. The Commission has the ability to forbear from regulation where regulation is unnecessary and adversely impacts the public interest in advancing competition.

^{36/} On May 14, 1998, the Commission adopted its Third Annual Commercial Mobile Radio Service Competition Report ("Third Report") evaluating various CMRS product categories and finding that progress had been made toward competition, particularly in the mobile telephony market. More competition, the Third Report observed, "has meant lower prices, more choices and new cutting edge technologies for American consumers." The purpose of the annual reports to Congress is to monitor the level of competition and innovation that is developing in the wireless marketplace. *See* FCC Adopts Third Annual Report to Congress on State of CMRS Competition, *News*, Report No. WT 98-13 (May 14, 1998).

uniform regulation in the case where the CMRS, unlike the landline market, had no demonstrated history of slamming.^{37/} According to the Commission, the record did not:

reflect the same high volume of customer complaints in the CMRS context, nor does the record indicate that CMRS billing practices fail to provide consumers with the clear and non-misleading information they need to make informed choices. [Thus] [i]f current CMRS billing practices are clear and non-misleading to consumers, then it might be appropriate either to forbear from specific wireline rules or not to apply them in the first instance. Furthermore, in some instances, the rules we have adopted might simply be inapplicable in the wireless context.^{38/}

As for CMRS interexchange rate integration, there is no record of consumer complaints that requires that the Commission intervene. In the absence of such consumer dissatisfaction in the CMRS marketplace, the Commission should forbear from applying Section 254(g)'s rate integration obligations, which present the substantial practical problems Nextel has already discussed.^{39/} Such forbearance would be consistent with the Commission's pro-competitive goals and recent CMRS policy decisions.

^{37/} See Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, FCC 99-72 (rel. May 11, 1999).

^{38/} *Id.* at ¶ 16.

^{39/} CMRS providers face practical problems with the Commission's latest gloss on applying the "interstate interexchange" rate integration concept onto CMRS rates. The problem with an MTA-specific approach to defining the CMRS rate integration obligation is that it fails to acknowledge unique licensing and operational realities of various subsets of CMRS carriers, including ESMR providers. See Nextel Reply at 5-6. Even Alaska and Hawaii, the two staunchest defenders of rate integration for CMRS, have conceded in their oppositions to the Nextel Petition that there may be a problem with an MTA-specific approach to defining the CMRS rate integration obligations and that some flexibility may be warranted. See Opposition of the State of Alaska in CC Docket No. 96-61, at 7-8, fn 15 (filed April 16, 1999); Opposition of the State of Hawaii in CC Docket No. 96-61 at 2 (filed on April 16, 1999).

III. THERE ARE BROAD PUBLIC POLICY IMPLICATIONS THAT RESULT FROM A DECISION TO APPLY SECTION 254(G) TO CMRS RATE PLANS.

As Nextel believes the Commission recognizes, CMRS has always been a service distinct from landline interexchange or purely local service. Under the Commission's CPNI rules, for instance, CMRS is not considered an interexchange service.^{40/} Similarly, in 1993, Congress deregulated the rates charged by CMRS providers without differentiating between CMRS local or interexchange rates, thus encouraging the proliferation of a wide range of competitive CMRS services.^{41/} This rate deregulation and the introduction of new digital service competitors like Nextel have sparked real rate and service competition, significantly increasing the availability of wireless technology to millions of Americans. From Nextel's perspective, it would be a huge step backwards to require CMRS to rate integrate. As Commissioner Powell has stated, a CMRS rate integration requirement would not only frustrate CMRS rate competition, but also potentially

^{40/} Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, *Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8062, 8080 (1998) (delineating the three *distinct* categories of telecommunications service offerings — local, interexchange, and CMRS — within which a customer's approval of CPNI use is implied).

^{41/} Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993).

spawn the perverse result of promoting calling plans designed to avoid rate regulation rather than encouraging carriers to respond to competitive conditions in the CMRS marketplace.^{42/}

Regulation in this context would indeed turn the Commission's deregulatory policy for CMRS on its head. It also may confer artificial advantages upon CMRS carriers that have more regional than national operations, and thus would be less impacted by an interexchange rate integration regime.

IV. CONCLUSION

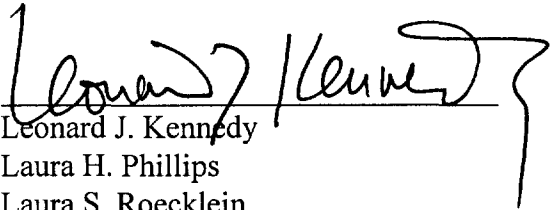
Rate integration is not legally required for CMRS. If the Commission decides however, that it cannot read Section 254(g) without including some CMRS services, then the Commission must carefully assess the evidence in favor of forbearance. Any determination against forbearance and in favor of rate regulation has the potential for enormous waste of resources and the potential for withdrawal of existing services from the market. Further, it would be a tall order for the Commission to craft a definition of the applicable services that should fall within the scope of Section 254(g) that is rational given the wide variety of CMRS carrier operations and practices. By far the better solution is to allow the market to work and to intervene only

^{42/} Dissenting Statement of Commissioner Michael K. Powell, 1999 FCC LEXIS 400 at *18-*21 (Jan. 29, 1999). To the extent that the Commission continues to apply rate integration to CMRS providers, the Commission should clarify that rate integration only applies to "covered SMRs," thus excluding all SMRs except for those operating wide-area digital systems.

where the market fails to ensure reasonable CMRS “interexchange” rates to offshore, rural and high cost area consumers.

Respectfully Submitted,

NEXTEL COMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Leonard J. Kennedy", is written over a horizontal line. The signature is stylized with a large, sweeping 'L' and a long, trailing flourish.

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May 27, 1999

CERTIFICATE OF SERVICE

I, Jeanette M. Corley, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 27th day of May, 1999, I caused copies of the foregoing "**Comments of Nextel Communications, Inc.**" to be served upon the parties listed below via hand delivery or first-class mail:

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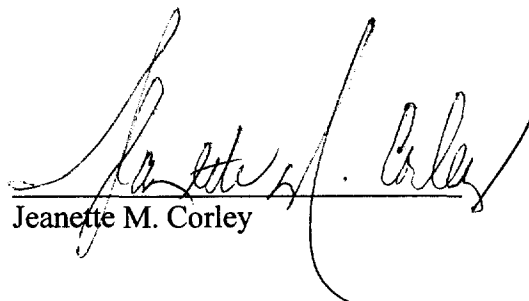
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